PROTASCO BHD v. PT ANGLO SLAVIC UTAMA & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN J
[CIVIL SUIT NO: 22NCC-362-09-2014]
15 MARCH 2019

CIVIL PROCEDURE: *Discovery – Inspection and obtaining copies of documents from banks – Application for – Test of relevancy – Whether fulfilled – Whether applicant entitled to seek inspection of banker's books – Whether application mere fishing expedition – Whether applicant had case that may be aided by order of discovery – Whether applicant sought in effect to reverse burden of proof – Whether legal burden of proof shifted – Whether court had jurisdiction to grant orders – Admissibility of documents – Determination of – Bankers' Book (Evidence) Act 1949, s. 7*

The plaintiff, a public listed company, made an application in encl. 307 under the Bankers' Book (Evidence) Act 1949 ('Bankers' Book Act') to inspect and obtain copies of certain documents in the possession of Malayan Banking Berhad, CIMB Bank Bhd and CIMB Islamic Bank Bhd ('the banks'). The plaintiff contended that these documents established the trail of payments of money that ultimately wound its way back into the pockets of the second and third defendant (the former directors of the plaintiff). The application was allowed on 7 January 2019. The plaintiff made a subsequent application in encl. 395 for the court to determine the admissibility of certain documents disclosed pursuant to the said order. Briefly, the facts were that the plaintiff alleged that the second and third defendants had fraudulently caused the plaintiff to enter into a transaction to acquire shares in a company that purportedly owned oil exploration rights in Indonesia from the first defendant. The plaintiff sought, among others, to recover the sum of USD 27 million from the second and third defendants. Shortly after this suit was commenced, a company, Kingdom Seekers Ventures Sdn Bhd, sued the plaintiff. The second defendant in the present action held a press conference at which he stated that the moneys paid by the plaintiff in the share acquisition had been paid to some related and associate companies. Acting upon the information contained in that statement of claim and in the press statement issued by the second defendant, the plaintiff sought and obtained the order pursuant to s. 7 of the Bankers Books Act. The information obtained from this first s. 7 order led the plaintiff to make a further application in encl. 307 under the Bankers' Book Act, the object of which was to ascertain where the moneys had flowed from the related and associate companies. According to the plaintiff, the flow of funds was relevant for the purposes of establishing the plaintiff's claim. The second and third defendants resisted the application for discovery on the following grounds (i) that the application under the Bankers' Book Act was misconceived and an abuse of process, having regard to the legislative intent of the Bankers' Book Act; (ii) that the application for discovery was a mere fishing

A expedition; and (iii) that the plaintiff had, by the application under the Bankers' Book Act, sought in effect to reverse the burden of proof, which was impermissible in law.

Held (allowing application):

B **(1)** In determining whether to grant an order under s. 7 of the Bankers' Book Act, the courts are to apply the general rules applicable in an application for discovery. The test was thus one of relevancy to the plaintiff's case. In examining the relevancy or materiality of the plaintiff's application for discovery to a fact in issue, the plaintiff's case must be assumed to be true. Applying the test of relevancy to the facts of the application in C encl. 307, the inspection of the banker's books ought to be allowed, as it would go towards establishing the plaintiff's case against the second and third defendants. The information obtained from the inspection of the accounts and other books held by the banks would establish the money trail, and would determine whether or not the money paid by the D plaintiff under the share acquisition had found its way back into accounts controlled by the second and third defendants. (paras 45- 50)

(2) It was incorrect to say that the Bankers' Book Act may not be used by a party to obtain evidence where none previously existed in the hands of that party. The plaintiff was well entitled to seek inspection of the E banker's books and to make copies of entries in such books, in order to prove its assertion regarding the flow of funds back to the second and third defendants. Whether or not the court ought to grant the order would depend on the proper application of the principles of discovery. Herein, the test of relevancy had been fulfilled and so granted the orders F prayed for. This construction was supported by the plain words of s. 7, which in no uncertain terms provide for the right to inspect banker's books and to take copies of entries in such books. Thus, the court had the jurisdiction to grant the orders prayed for (paras 58-62)

G **(3)** The application in encl. 307 was not grounded upon a bare assertion in the statement of claim. The objective and undisputed facts showed that there indeed had been an acquisition of shares and that substantial amounts had been paid over to the seller of the shares, being the first defendant. It could not reasonably be disputed that the flow of money would be a material piece of information that would go towards H establishing or indeed disproving the claim of the plaintiff. If it could be shown that the money never touched any accounts owned or controlled by the second and third defendants, this information would tend to exculpate them from some or all of the charges against them. There were indeed sufficient pleaded facts to show that the plaintiffs did I in fact have a case that may be aided by an order of discovery, and that, as a consequence, the application for discovery was not a mere fishing exercise. (paras 66 & 67)

(4) The order under s. 7 of the Bankers' Book Act was not sought against the defendants, but rather against third parties *ie*, the banks. The second and third defendants here were not being asked to disclose any matter. If it was not the defendants who would be subjected to the court order, then it could never be said that the legal burden of proof had shifted.

(5) It was the parties' common position that the questions regarding the scope of the Bankers' Book Act and its interrelation with the general law of discovery would have a material impact on the issue of admissibility of the documents sought to be relied upon by the plaintiff. The parties came to a consensus for a judgment to be delivered on these issues and for final determination of these issues to be decided on appeal. It was for this reason that the plaintiff filed its application in encl. 395. This court had set out this in this judgment *passim* the applicable principles to be applied in making such determination (a) the court must first make a determination whether a document sought to be adduced comes within the definition of 'banker's books'. This is a mixed question of fact and law. Accordingly, evidence may well have to be led as to the purpose for which the bank had generated, or maintained a record of, the document in question, and (b) once this determination is made, then the plaintiff will have to satisfy the court that (i) in the case of a copy of an entry in a banker's book, the requirements of ss. 4 and 5 of the Bankers' Book Act had been fulfilled; and (ii) in any other case, the requirements relating to proof of a document and its relevancy and admissibility had been fulfilled. (paras 72 & 73)

Case(s) referred to:
Arnott v. Hayes (1887) 36 Ch D 731 ***(refd)***
Asylum for Idiots v. Handyside (1906) 22 TLR 573 ***(refd)***
Barker v. Wilson [1980] 1 WLR 885 ***(refd)***
Douglas v. Pindling [1996] AC 890 ***(refd)***
Extreme System Sdn Bhd v. Ho Hup Construction Company Bhd & Ors (No 4) [2011] 10 CLJ 186 HC ***(refd)***
Kenwood Electronics (Malaysia) Sdn Bhd v. People's Audio Sdn Bhd & Ors [2003] 5 CLJ 436 HC ***(dist)***
Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (T/A JB International) [1981] 1 LNS 204 HC ***(refd)***
Re Howglen Ltd [2001] 1 All ER 376 ***(refd)***
South Staffordshire Tramways Company v. Ebbsmith [1895] 2 QB 669 ***(refd)***
WA Pines Pty Ltd v. Bannerman(1980) 30 ALR 559 ***(dist)***
Williams v. Williams [1988] 1 QB 161 ***(refd)***
Yekambaran Marimuthu v. Melayawata Steel Bhd [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:
Bankers' Books (Evidence) Act 1949, ss. 3, 4, 5, 6, 7
Evidence Act 1950, ss. 17, 21, 62, 90A(2), 130(3)
Rules of Court 2012, O. 24 r. 7A(2)

Bankers' Books Evidence Act 1879 [UK], s. 6

For the plaintiff - Peter Skelchy, S Sivaneindiren, Joycelyn Teoh & Melissa Loy; M/s Cheah Teh & Su

For the 2nd and 3rd defendants - Malik Imtiaz, R Jayasingam, Ng Keng Yang, Yvonne Lim & Khoo Suk Chyi; M/s BH Lawrence & Co

For CIMB Bank Berhad & BIMB Islamic Bank Berhad - Arham Rahimy Hariri; M/s Edlin Ghazaly & Assocs

[Editor's note: On 6 March 2020, the Court of Appeal in Tey Por Yee & Anor v. Protasco Bhd & Other Appeals [2020] 5 CLJ 216; [2020] 1 LNS 210 allowed the appeals by Tey Por Yee (2nd defendant) and Ooi Kock Aun (3rd defendant) and overruled the decision of the High Court herein.]

Reported by Suhainah Wahiduddin

JUDGMENT
(encls. 307 & 395)

Azizul Azmi Adnan J:

Introduction

[1] The plaintiff made an application in encl. 307 under the Bankers' Books (Evidence) Act 1949 to inspect and obtain copies of certain documents in the possession of Malayan Banking Berhad, CIMB Bank Bhd and CIMB Islamic Bank Bhd (the "banks"). The plaintiff contended that these documents establish the trail of payments of money that ultimately wound its way back into the pockets of the second and third defendants.

[2] I allowed this application on 7 January 2019, for reasons that I will explain in this judgment.

[3] The plaintiff made a subsequent application in encl. 395 for the court to determine the admissibility of certain documents disclosed pursuant to the order of 7 January 2019, and a prior order of 25 June 2018. The applicable principles relating to the admissibility of documents disclosed pursuant to these orders are also explained in this judgment.

Background

[4] For the present purposes, the plaintiff's action in this case may be summarised briefly as follows.

[5] The plaintiff is a publicly listed company. The second and third defendants are former directors of the plaintiff. The plaintiff alleges that they had fraudulently caused the plaintiff to enter into a transaction to acquire shares in a company that purportedly owned oil exploration rights in Indonesia from the first defendant. The plaintiff alleges that the second and third defendants had personal interests in (among others) the first defendant, which they failed to disclose to the plaintiff in breach of their fiduciary duty as directors.

[6] The plaintiff seeks, among others, to recover the sum of USD27 million from the second and third defendants.

[7] Shortly after this suit was commenced in 2014, a company known as Kingdom Seekers Ventures Sdn Bhd sued the plaintiff. In its statement of claim, Kingdom Seekers pleaded that certain companies were related and associate companies accustomed to dealing with one another. The day after this suit was filed, the second defendant in the present action, Dato' Larry Tey, held a press conference at which he stated that the moneys paid by the plaintiff in the share acquisition had been paid to some of those related and associate companies.

[8] The plaintiff contends that Kingdom Seekers is Dato' Tey's corporate vehicle.

[9] Acting upon the information contained in that statement of claim and in the press statement issued by Dato' Tey, the plaintiff sought and obtained an order pursuant to s. 7 of the Bankers' Books (Evidence) Act 1949.

[10] The information obtained from this first s. 7 order led the plaintiff to make a further application in encl. 307 under the Bankers' Books (Evidence) Act 1949, the object of which was to ascertain where the moneys had flowed from the related and associate companies. According to the plaintiff, the flow of funds is relevant for the purposes of establishing the plaintiff's claim and its contention that the funds ultimately found their way back into the pockets of the second and third defendants.

[11] The second and third defendants resisted the application for discovery on the following three grounds, which I have summarised from the written submissions of counsel:

(i) it was argued that the application under the Bankers' Books (Evidence) Act 1949 was misconceived and an abuse of process, having regard to the legislative intent of the Bankers' Books (Evidence) Act 1949 and the provisions for third-party discovery under O. 24 r. 7A of the Rules of Court 2012. Because of this – it was argued – the court did not have the jurisdiction to grant the orders prayed for;

(ii) it was argued that the application for discovery was a mere fishing expedition; and

(iii) finally, it was contended that the plaintiff has, by the application under the Bankers' Books (Evidence) Act 1949, sought in effect to reverse the burden of proof, which is impermissible in law.

Analysis

The Scheme Of The Bankers' Books (Evidence) Act 1949 Generally

[12] The relevant provisions of the Bankers' Book (Evidence) Act 1949 are reproduced below, for ease of reference:

> "banker's book" includes any ledger, day book, cash book, account book and any other book used in the ordinary business of a bank;

A Section 3. Mode of proof of entries in bankers' books.

Subject to this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry and of the matters, transactions and accounts therein recorded.

Section 4. Proof that book is a banker's book.

B

(1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is first proved that the book was, at the time of the making of the entry, one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

C

(2) Such proof may be given by an officer of the bank, and may be given orally or by an affidavit sworn before any magistrate or person authorised to take affidavits.

Section 5. Verification of copy.

D

(1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is further proved that the copy has been examined with the original entry and is correct.

(2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any magistrate or person authorised to take affidavits.

E

Section 6. Case in which officer of bank not compellable to produce books, etc.

An officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a Judge made for special cause.

F

Section 7. Court or Judge may order inspection.

(1) On the application of any party to a legal proceeding the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.

G

(2) An order under this section may be made either on or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed unless the Court or Judge otherwise directs.

H

[13] The intent of the Bankers' Books (Evidence) Act 1949 is to relieve a bank from the need to produce the original of its books, and thus reducing the potential disruption that may be caused to the business of the bank, where otherwise its books may be in evidence before a court pursuant to a *subpoena duces tecum* and thus inaccessible for the purposes of the bank's day-to-day business.

I

[14] Of course, this legislation has its genesis in 19th century Britain. Much has changed since then, not least the computerisation of banking records. Together with amendments to the Evidence Act 1950 effected in 1993, there will now be little, if any, disruption that will be caused to a bank for it to produce the records of the transactions undertaken by it. Most of the records kept by the bank, and certainly all of its transaction records, will be in electronic form. In 1993, the definition of "document" in the Evidence Act 1950 was amended to include electronic data, and explanation 3 was introduced to s. 62 to provide that any print out of that data would be admissible as primary evidence. As a result of these amendments, a physical representation of banking records can be generated quite literally at the touch of a button, without the risk of disrupting the ordinary business of the bank. That physical representation – usually in the form of a statement, ledger or other paper document recording banking entries, would not only be primary evidence under s. 62, but would also be admissible without the need to call the maker of the document, pursuant to s. 90A of the Evidence Act 1950. The maker of a data entry in the records of a bank may well be a data entry clerk whose identity will have been lost in the mists of time. That, however, does not matter, as policy dictates that there ought to be a presumption of reliability in the data kept by the bank in the ordinary course of its business. This, in part, is the objective of s. 90A, though its ambit extends well beyond banks. Section 90A operates as an exception to the exclusionary rule against hearsay, and relieves a party from having to call the maker of the computer-generated document, subject to the fulfilment of certain conditions.

[15] Despite the advancements in record-keeping practices, we are still tasked with having to make sense of the application of 19th century rules of evidence to present day circumstances.

[16] The first observation that may be made of the Bankers' Books (Evidence) Act 1949 is that its scope is limited to "banker's books". It is defined in a non-exhaustive way, but it is clear that the words "other book" must be read *ejusdem generis* with "ledger", "day book", "cash book" and "account book". This is considered in further detail at para [26] *et seq*., *post*.

[17] Section 3 of the Bankers' Books (Evidence) Act 1949 allows copies of any entry in a banker's book to be admissible without the need for the original to be adduced. Copies will be "*prima facie*" evidence of the entry, which means that evidence may be led to show that the entry is, for whatever reason, inaccurate. This copy will only be admissible if the requirements of ss. 4 and 5 are complied with. Section 4 provides that an officer of the bank must either provide oral testimony or depose an affidavit stating that:

(i) the book was one of the ordinary books of the bank;

(ii) the entry was made in the usual and ordinary course of business; and

(iii) that book is in the custody or control of the bank.

[18] Section 5 in turn provides that the copy must have been compared with the original and confirmed as correct by any person. That person must testify either in person or through an affidavit that he has done so.

[19] It is only once ss. 4 and 5 are complied with that a copy of any entry in a banker's book may be admitted into evidence.

[20] Section 3 must be understood in the context modern banking practice and the provisions of the Evidence Act 1950. A print-out from a banker's book (and it will be remembered that a banker's book, as explained, will in the vast majority of cases now be in electronic form) will itself be an original. This original would of course be admissible as primary evidence, without the need to comply with ss. 4 and 5 of the Bankers' Books (Evidence) Act 1949.

[21] The main operative provision in the Bankers' Books (Evidence) Act 1949 is s. 7, which allows the court to order a bank to provide to a litigant access to banker's books and to make copies of entries in such books. The bank need not be a party to the proceedings. There must, however, be proceedings afoot, and the Bankers' Books (Evidence) Act 1949 does not envisage the ability to obtain pre-action discovery against a bank.

[22] Section 6 relieves banks from the obligation to produce any banker's books pursuant to a *subpoena duces tecum*. Thus a court will not generally have any power to order an officer of a bank to produce any banker's book where the contents of such books can be proved pursuant to the provision of the Bankers' Books (Evidence) Act 1949. There is, however, still a residual power of the court to compel production of any banker's books by order made "for a special cause". The Bankers' Books (Evidence) Act 1949 does not provide guidance on the meaning of "special cause" in this context, but logic dictates that there must be a specific application made to the court for the production of records relating to specific transactions. It seems to me that a court would also be entitled to compel production pursuant to the "special cause" proviso under s. 6 where a bank has failed to comply with a prior order granted under s. 7, or where there is a dispute as to the accuracy of the copy attempted to be admitted into evidence. In *Douglas v. Pindling*[1], the Judicial Committee of the Privy Council, on appeal from the Bahamas, held that an order may be made for special cause in order for originals of the banker's books to be produced, rather than mere copies.

[23] Section 130(3) of the Evidence Act 1950 amplifies the position under s. 6, by providing:

> (3) No bank shall be compelled to produce its books in any legal proceeding to which it is not a party, except as provided by the law of evidence relating to banker's books.

[24] Despite the marginal note, which states: "production of title deeds of witness not a party", it will be seen from its plain words that sub-s. (3) is in fact of general application and is not just limited to title deeds. The phrase "its books" in s. 130(3) must necessarily be read to mean "banker's books" as defined in the Bankers' Books (Evidence) Act 1949.

[25] This leads the discussion into what is meant by "banker's books", which is considered in the following paragraphs.

The Meaning Of "Banker's Books"

[26] The Bankers' Books (Evidence) Act 1949 applies only to "banker's books". This statement would appear to be so blindingly obvious that it is almost perverse to have to mention it.

[27] Things, however, are seldom as simple as they first appear.

[28] There are a number English cases that have dealt with the definition of "banker's books" under the English[2] Bankers' Books (Evidence) Act 1879. These cases must however be considered with care, as the 1879 Act has been amended (or modernised) such that the definition of banker's books now reads as follows:

> Expressions in this Act relating to "bankers' books" include ledgers, day books, cash books, account books and other records used in the ordinary business of the bank, whether those records are in written form or are kept on microfilm, magnetic tape or any other form of mechanical or electronic data retrieval mechanism.

[29] Prior to 1979, the definition of "banker's books" in the 1879 Act appear to be in *pari materia* with the Malaysian provisions.

[30] As mentioned previously, even though the term "banker's books" is defined non-exhaustively, a banker's book must be a book used in the ordinary business of a bank. It must also be construed *ejusdem generis* with ledger, day book, cash book and account book: *Re Howglen Ltd*[3]. In that case, it was held that the term "banker's book" does not cover records kept by the bank of conversations between employees of the bank and its customers. In the case of *Asylum for Idiots v. Handyside*[4], the term was defined broadly as any form of permanent record maintained by a bank in relation to the transactions of a customer.

[31] In *Williams v. Williams*[5], the Court of Appeal held that unsorted bundles of cheques do not form part of any banker's books. The particular facts of this case bear further examination. The plaintiff wife in this case sought, in matrimonial proceedings against the husband, to inspect cheques issued by a "charitable" organisation of which her husband was chairman. The inter-bank and inter-branch credit and debit statements did not record the payee of the cheques, but merely the cheque numbers. Evidence was received in this case that Barclays Bank processed cheques using an electronic reader-sorter. Once processed, the cheques are returned to the paying branch,

where they sit in unsorted bundles, unless the customer requests for their return. Approximately 3.5 to 4% of the cheques turn out not to be machine readable, in which event the cheques are photographed on microfilm and dealt with manually. Sir John Donaldson MR held:

> Whilst I would be prepared to accept that the cheques constitute part of the bank's records used in the ordinary business of the bank ..., I am quite unable to accept that adding an individual cheque or paying-in slip can be regarded as making an 'entry' in those records. Putting the matter in another way, 'other records' in the new definition has, I think, to be construed *ejusdem generis* with 'ledgers, day books, cash books [and] account books' and unsorted bundles of cheques and paying-in slips are not 'other records' within the meaning of the Act.

[32] It has to be appreciated that in *Williams v. Williams*, the Court of Appeal accepted that, whatever records that Mrs Williams was unable to obtain via an order under the 1879 Act, would be discoverable by her pursuant to a *subpoena duces tecum*. It is noted in this regard that s. 6 of the 1879 Act is in *pari materia* with our s. 6 (which provides for non-compellability of bank witnesses in respect of the production of banker's books). This stands to reason, as the Bankers' Books (Evidence) Act 1949 was intended to relieve a bank from the inconvenience of having its books tied up as evidence in court. If what is sought to be produced are not the books of the bank that it uses on a day-to-day basis, then the fact that an officer of the bank may be called to court to produce the original of that document would not materially disrupt the business of the bank.

[33] The Court of Appeal in *Williams v. Williams* considered, but distinguished, the earlier High Court case of *Barker v. Wilson*[6], which was decided under the law prior to the 1979 amendments to the 1879 Act. Wilson was a detective constable who was investigating the alleged theft by Barker from his employer. Wilson sought for an order under the 1879 Act for the records of cheques that had been drawn by the Barker over a number of years. The cheques were required by the police in order to ascertain who the payees of the cheques were. These cheques were recorded on microfilm that were kept by the bank.

[34] The court found that the microfilm images of the cheques formed part of banker's books within the meaning of the 1879 Act, even though in ordinary language microfilm would not usually be called a book. The microfilm was a record of the transactions that had been undertaken by Barker at the bank, and so quite clearly formed part of banker's books.

[35] The point of distinction between *Williams v. Williams* and *Barker v. Wilson* is this. Where the cheques are kept by the bank in unsorted bundles after they have been processed by an automated cheque reader, these cheques will not form part of banker's books. Where however, as part of the processing procedures, an image of each cheque is recorded on microfilm,

that microfilm would form a part of banker's books. Much therefore depends on how the bank processes the documents that it has in its possession, in order to ascertain whether any particular document comes within the meaning of banker's books.

[36] Bridge LJ held:

> The Bankers' Books Evidence Act 1879 was enacted with the practice of bankers in 1879 in mind. It must be construed in 1980 in relation to the practice of bankers as we now understand it. So construing the definition of 'bankers' books' and the phrase 'an entry in a banker's book', it seems to me that clearly both phrases are apt to include any form of permanent record kept by the bank of transactions relating to the bank's business, made by any of the methods which modern technology makes available, including, in particular, microfilm.

[37] I take a similarly expansive view of the word "books" within the definition of "banker's books" under the Bankers' Books (Evidence) Act 1949. The expression is wide enough, in my view, to encompass any matter coming within the definition of "document" within the meaning of the Evidence Act 1950.

[38] In my view, in order to come within the definition of "banker's books", a document:

(i) must comprise any transaction record that is generated by the bank; or

(ii) must be a document which the bank maintains,

for the purposes of accounting, audit, reconciliation or reporting.

[39] The bank may be in possession of third party documents as part of the conduct of its business in the ordinary course. For example, the know-your-client or credit evaluation procedures of a bank may require it to obtain the constituent documents of a borrower, the salary slips of a customer, or the financial projections for a project undertaken by a borrower. All these are not documents generated by the bank and hence cannot be proved by the facility provided by the Bankers' Books (Evidence) Act 1949. If for any reason a copy of such a document has been obtained from the records of the bank, then that document would be subject to the ordinary rules of evidence, including the rule against hearsay. The document may not be adduced to prove the truth of its contents, without the maker also being called. It may however be adduced to show that it had been given to the bank. If it is sought to be proved against the maker of the document, then it may be admissible as an admission of a fact in issue, pursuant to ss. 17 and 21 of the Evidence Act 1950.

[40] On the other hand, there may exist documents that are generated by the bank but does not comprise a record of any transaction undertaken by or with the bank. An example would be marketing brochures or pamphlets produced by the bank. These indisputably are not "banker's books".

[41] I am of the view that statements issued by a bank to its customer would not come within the meaning of banker's books, on the basis that such statements would not have been generated by the bank for the purposes of accounting, reconciliation, audit or reporting. The aim of the Bankers' Books (Evidence) Act 1949 is to relieve the bank from having to produce originals of records that it keeps for its own internal purposes. A bank statement is given by the bank to its customer not for the purposes of recording a transaction in the books of the bank, but rather to inform the customer of what balances are standing to the credit in the customer's account with the bank, and of what transactions have been undertaken since the last statement date. The information contained in the statements would be derived from entries in the banker's books, but the statements themselves are not banker's books.

[42] The practical effect of the provisions are as follows:

(a) If the document sought is within the meaning of banker's books and a copy of the relevant entries are provided, then the party seeking to adduce the document will have to comply with ss. 4 and 5 of the Bankers' Books (Evidence) Act 1949;

(b) If the document is within the meaning of banker's books and an original has been provided (such as a print-out of data stored within a computer system operated and maintained by the bank), there is then no need for compliance with ss. 4 and 5. All that is necessary is for a certificate pursuant to s. 90A(2) of the Evidence Act 1950 to be provided by a person responsible for the management of the operation of the computer system in the bank. It does appear, however that the certificate must be tendered through its maker, unless parties agree otherwise. This leaves us with the somewhat unsatisfactory position that a copy of entries of a banker's book may be tendered via an affidavit by a bank officer, whereas an original of electronic entries of accounts maintained by the bank will still require an officer of the bank to testify at trial;

(c) If the document sought is not within the meaning of banker's books, then the usual procedures relating to third-party discovery will apply. A bank officer in possession or control of such a document would also be compellable in the same manner as any other witness.

[43] If a document is, for whatever reason, disclosed by a bank pursuant to an order granted under s. 7 of the Bankers' Books (Evidence) Act 1949, but that document is not a document that comes within the definition of banker's books, the party in receipt of such document would be entitled to adduce that document at trial, subject to fulfilment of the requirements for proof and relevancy. Thus, if a bank to whom an order under s. 7 applies inadvertently or mistakenly discloses to the party in whose favour the order

had been granted a document that does not come within the definition of banker's books, then that party must prove the document in the usual course. The original must be produced, unless the requirements for the reception of secondary evidence have been fulfilled. The maker of the document must be called, unless one of the exceptions to rule against hearsay applies.

[44] All documents received by a party from a bank pursuant to a s. 7 order would be subject to an implied undertaking that they not to be used otherwise than for the proper conduct of the action: *Extreme System Sdn Bhd v. Ho Hup Construction Company Bhd & Ors (No 4)*[7]. In my view, this applies regardless of whether the documents received come within the definition of banker's books.

The Test To Be Applied In Granting A Section 7 Order

[45] In determining whether to grant an order under s. 7 of the Bankers' Books (Evidence) Act 1949, the courts are to apply the general rules applicable in an application for discovery: *South Staffordshire Tramways Company v. Ebbsmith*[8].

[46] The test is thus one of relevancy to the plaintiff's case. Guidance as to whether a document sought is relevant is found in the following passage of the Singapore High Court case of *Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (T/A JB International)*[9]:

> Under a general order of court for discovery, a party is obliged to make discovery of all documents relevant to the matters in question in the action. What are the matters in question would depend on the pleadings. A document relates to the matter in question in the action if it contains information which may – not which must – either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary or which may fairly lead to a train of inquiry which may have either of those two consequences: see *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co* (1882) 11 QBD 55 at p 62. Documents relate to matters in question in the action so long as they are likely to throw light on the case: see *Merchants' & Manufacturers' Insurance Co Ltd v. Davies* [1938] 1 KB 196 at p 210.

[47] In examining the relevancy or materiality of the plaintiffs' application for discovery to a fact in issue, the plaintiffs' case must be assumed to be true: see *Yekambaran Marimuthu v. Malayawata Steel Bhd*[10], where Edgar Joseph Jr SCJ, delivering the decision at the High Court, cited with approval the following passage from *The Principles and Practice of Discovery* by Edward Bray:

> ... for the purpose of testing the materiality of the discovery to a particular issue … it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.

[48] In *South Staffordshire Tramways Company v. Ebbsmith* (*op. cit.*), the English Court of Appeal held that, once the person in respect of whose accounts inspection is sought avers an affidavit to the effect that the documents or information sought are irrelevant, then the court ought not order the inspection. The relevant passages of the judgment bears setting out *in extenso*:

> This is an application for inspection before the trial; and it appears to me that, where such an inspection is asked for, the conduct of the Court in the exercise of this jurisdiction ought to be regulated by the general rules laid down by the decisions in relation to inspection of documents before the trial. It was the rule of the Court of Chancery, where such an inspection of documents was asked for, that the Court granted it subject to this, namely, that, if in answer to the application the defendant pledged his oath to the fact that certain entries were irrelevant to the matters in dispute, the Court accepted that answer, leaving the defendant exposed to the risk of a prosecution for perjury, if it was untrue. I think that in exercising its jurisdiction under the 7th section of the Bankers' Books Evidence Act, 1879 , the Court ought to be governed by the same rule. The defendant has taken upon himself to pledge his oath that the items which he gives from his banking account are the only items relevant to the matters in issue between him and the plaintiffs; and I think that for the time the Court must accept that statement on oath, and, as he cannot at the present stage of the proceedings be cross-examined upon it, the Court must act upon that statement. The Court must, therefore, refuse to order the inspection applied for before the trial, leaving it to the judge at the trial to make such order as he may think fit in the matter.

[49] In my judgment, the views expressed in the passage quoted above no longer reflect the general rules governing discovery. The principal test is one of relevancy, and as explained *ante*, the plaintiff's assertions must be assumed to be true in assessing the relevance of the information sought to be obtained by the order of discovery or inspection. Accordingly, while the decision in *South Staffordshire Tramways v. Ebbsmith* may be properly cited for the general rule that the principles governing discovery apply in determining whether or not an order for inspection ought to be granted under the Bankers' Books (Evidence) Act 1949, it cannot be relied upon for the purposes of determining what those discovery principles are, for much water has flowed under the bridge since 1895.

[50] Applying the test of relevancy to the facts of the application in encl. 307, I was of the view that the inspection of the banker's books ought to be allowed, as it would go towards establishing the plaintiff's case against the second and third defendants. The information obtained from an inspection of the accounts and other books held by the banks would establish the money trail, and would determine whether or not the money paid by the plaintiff under the share acquisition had found its way back into accounts controlled by the second and third defendants. For this reason, I allowed the application.

The Defendants' Objections

[51] It will be recalled that the second and third defendants objected to the plaintiff's application on three grounds:

(i) it was argued that the application under the Bankers' Books (Evidence) Act 1949 was misconceived and an abuse of process, having regard to the legislative intent of the Bankers' Books (Evidence) Act 1949 and the provisions for third-party discovery under O. 24 r. 7A of the Rules of Court 2012. Because of this – it was argued – the court did not have the jurisdiction to grant the orders prayed for;

(ii) it was argued that the application for discovery was a mere fishing expedition; and

(iii) finally, it was contended that the plaintiff has, by the application under the Bankers' Books (Evidence) Act 1949, sought in effect to reverse the burden of proof, which is impermissible in law.

[52] These objections are addressed in turn in the following paragraphs.

Abuse Of Process

[53] Dato' Malik Imtiaz for the second and third defendants argued with that the legislative intent of the Bankers' Books (Evidence) Act 1949 was to relieve banks from the inconvenience of having to tender their books into evidence in response to a *subpoena duces tecum*, but does not provide parties with an independent right of discovery. It was also argued that the Bankers' Books (Evidence) Act 1949 merely provides for a facility by which entries in banker's book may be proved, but does not allow the document themselves to be obtained. Thus, according to this argument, it is only if the plaintiff already has a copy of the document but wishes to obtain the original for the purposes of admitting that document into evidence at trial, that it may proceed under the Bankers' Books (Evidence) Act 1949.

[54] The argument may be summed up thus: the Bankers' Books (Evidence) Act 1949 only facilitates proof of evidence, but does not permit evidence to be obtained where none had previously existed in the hands of the plaintiff.

[55] Respectfully, I am of the view that Dato' Malek is only half correct. While it is indisputably true that the intent of the legislation was to provide relief to bankers from the inconvenience of having their ledgers and other books from being removed for use in legal proceedings, the Act also, as a necessary consequence, provides for a right of inspection over a banker's books as well as a right to obtain copies of entries in those books.

[56] In *Williams v. Williams*, the legislative intent was explained in the following manner:

> The first Bankers' Books Evidence Act was enacted in 1876. Its purpose was set out in the preamble:

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> 'WHEREAS serious inconvenience has been occasioned to bankers and also to the public by reason of the ledgers and other account books having been removed from the banks for the purpose of being produced in legal proceedings: And whereas it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books: Be it therefore enacted [*etc*].'

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The way this was achieved was by providing that entries in the bank's books should be admissible as *prima facie* evidence of the 'matters, transactions, and accounts recorded therein', subject to verification by the bank's officers and that copies of all such entries should be admissible in evidence without production of the originals.

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[57] In *Arnott v. Hayes*[11], Fry LJ held as follows:

> [A]s to the general construction of the Act, it is said that this order gives the Plaintiff a discovery of documents which he has no right to inspect. But this inspection is necessary for the purposes of the Act. Before the Act it was necessary to call the banker by a *subpoena duces tecum*, and the party could not see the books till they were put in. The books are not now to be produced, but copies are to be used. How are copies to be obtained? The party requiring them cannot call on his adversary for copies; he therefore must himself make a copy, and he must have liberty to look at the books for that purpose.
>
> The legislation on this subject began in 1876. The Act of that year in its preamble states two objects: "Whereas serious inconvenience has been occasioned to bankers and also to the public by reason of the ledgers and other account books having been removed from the banks for the purpose of being produced in legal proceedings, and whereas it is expedient to facilitate the proof of the transactions recorded in such ledgers and account books." I see no reason to suppose that when the Act of 1879 was substituted for this Act, the Legislature had not the same two motives. I think, therefore, that the facilitating the proof of the transactions recorded in the books was as much an object of the Act as the relief of bankers. **The right to inspection appears to me a necessary result of the provisions of the Act**.
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> (emphasis added)

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[58] It is therefore incorrect to say that the Bankers' Books (Evidence) Act 1949 may not be used by a party to obtain evidence where none previously existed in the hands of that party. The plaintiff here was well entitled to seek inspection of the banker's books, and to make copies of entries in such books, in order to prove its assertion regarding the flow of funds back to the second and third defendants. Whether or not the court ought to grant the order will depend on the proper application of the principles of discovery. I have held that the test of relevancy has been fulfilled and so granted the orders prayed for.

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[59] This construction is supported by the plain words of s. 7, which in no uncertain terms provide for the right to inspect banker's books and to take copies of entries in such books.

[60] It was also advanced for the second and third defendants that the plaintiff must instead proceed to apply for third-party discovery under O. 24 r. 7A(2) of the Rules of Court 2012.

[61] I am of the view that this is correct only in so far as what is sought to be discovered does not come within the definition of "banker's books". If the document that is sought is comprised within the definition of banker's books, then the only way in which the plaintiff is able to obtain a copy of that document is by way of an application under s. 7. This is due to the operation of s. 6, read together with s. 130(3) of the Evidence Act 1950. If the document is not encompassed in the definition of banker's books, then as explained in para. 42(c) *ante*, the proper way would be for the plaintiff to seek third-party discovery against the bank in question, or to subpoena an officer of the bank at trial.

[62] For the reasons explained above, I disagree that the court does not have the jurisdiction to grant the orders prayed for in encl. 307.

[63] The next question is, what if the bank had delivered to the plaintiff documents that were not within the definition of "banker's books"? I have addressed this point in para. 43 *ante*: the plaintiff may rely upon them subject to satisfaction of the usual requirements regarding proof and relevancy.

Mere Fishing Expedition

[64] It was advanced for the second and third defendants that the plaintiff's application was a mere fishing expedition. Such an application ought not be countenanced by the court:

> [T]he court would dismiss a plaintiff's application for discovery if it is of the view that the plaintiff was 'merely fishing for evidence to prop up his case' and to allow him discovery would be unduly oppressive to the party giving discovery – see *Leslie S Holmes v. Engineering Service Inc* [1993] 1 AMR 27 at p. 36.[12]

[65] An explanation of what amounts to impermissible fishing is contained in the decision of the Federal Court of Australia, exercising its appellate jurisdiction, in *WA Pines Pty Ltd v. Bannerman*[13]:

> Though the power to require discovery be acknowledged, how should it be exercised? It depends upon the nature of the case and the stage of the proceedings at which the discovery is sought. In the present case, discovery is sought before there is a tittle of evidence to suggest that the Chairman did not have the requisite cause to believe which para 6 of the statement of claim would put in issue. Some assistance was sought to be derived from cases where discovery had been given to a party before he was required to give particulars of his claim: cases such as *Ross v. Blake's Motors* [1951] 2 All ER 689, but in cases of that kind there is either an anterior relationship between the parties which entitles one to obtain information from the other, *or sufficient is shown to ground a suspicion that the party applying for discovery has a good case proof of which is likely to be aided*

A *by discovery. This is not such a case. This is a case where a bare allegation is made by para 6 of the statement of claim and, the paragraph being denied, the applicant seeks to interrogate the Chairman and ransack his documents in the hope of making a case. That is mere fishing*. As Smithers J said in *Melbourne Home of Ford Pty Ltd v. Trade Practices Commission*, *supra* (5 TPC at 35; ATPR at 18,087: "In the absence of such evidence the proceeding is essentially speculative in
B nature. In such circumstances for the Court to assist the applicants by making available to them the processes of interrogatories and discovery would be to assist them in an essentially fishing exercise and from this the Court on established principles should refrain." His Honour's refusal of discovery was right and it ought not to be disturbed.

C (emphasis added)

[66] Having examined the statement of claim, I am of the view that there are sufficient pleaded facts to show that the plaintiffs do in fact have a case that may be aided by an order of discovery, and that, as a consequence, the application for discovery is not a mere fishing exercise.

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[67] The facts of the present case can clearly be distinguished from *WA Pines Pty Ltd v. Bannerman*. The application in encl. 307 was not grounded upon a bare assertion in the statement of claim. The objective and undisputed facts show that there indeed had been an acquisition of shares and that substantial amounts have been paid over to the seller of the shares, being the
E first defendant. It cannot reasonably be disputed that the flow of money would be a material piece of information that would go towards establishing or indeed disproving the claim of the plaintiff. If it can be shown that the money never touched any accounts owned or controlled by the second and third defendants, this information would, in my view, tend to exculpate them
F from some or all of the charges against them.

Impermissible To Reverse The Burden Of Proof

[68] The third objection advanced for the second and third defendants was the contention that the plaintiff has, by the application under the Bankers'
G Books (Evidence) Act 1949, sought in effect to reverse the burden of proof, which is impermissible in law.

[69] Reliance was placed on the case of *Kenwood Electronics (Malaysia) Sdn Bhd v. People's Audio Sdn Bhd & Ors*[14]. In this case, the plaintiff was the local distributor of the Kenwood brand of consumer electronics. It sold goods to
H the first defendant, but was never paid for them. The plaintiff obtained judgment against the first defendant, but the judgment remained unsatisfied. The plaintiff alleged that the remaining defendants had in fact sold the goods through another company and had kept the proceeds to themselves. The plaintiff sought discovery of, among others, invoices, receipts and bank
I statements in the possession of the defendants, in order to prove its claim of conspiracy against the second to fourth defendants.

[70] The High Court declined to grant the order, in part because an order to compel the defendants to disclose and produce the documents sought would have the effect of shifting the legal burden of proof of conspiracy from the plaintiff to the second to fourth defendants.

[71] In my considered judgment, the case of *Kenwood Electronics (Malaysia) v. People's Audio* can be distinguished because in the present case, the order under s. 7 of the Bankers' Books (Evidence) Act 1949 was not sought against the defendants, but rather against third parties, ie, the banks. If it is not the defendants who will be subjected to the court order, then it can never be said that the legal burden of proof has shifted. The second and third defendants here were not being asked to disclose any matter.

Enclosure 395

[72] On the first day of trial in this case, the question of the admissibility of the documents received by the plaintiff from the banks came to be considered. The plaintiff elected to make a formal application for an order from the court, to which counsel for the second and third defendants did not object. It was the parties' common position that the questions regarding the scope of the Bankers' Books (Evidence) Act 1949 and its interrelation with the general law of discovery would have a material impact on the issue of admissibility of the documents sought to be relied upon by the plaintiff. For this reason, the parties came to a consensus for a judgment to be delivered on these issues and for final determination of these issues to be decided on appeal. It was for this reason that the plaintiff filed its application in encl. 395, seeking a determination that the documents obtained pursuant to the two s. 7 applications in encls. 48 and 307 be admitted as evidence and marked as exhibits.

[73] I have set out in this judgment *passim* the applicable principles to be applied in making such a determination. However, I am not able to allow the relevant documents to be admitted into evidence without first addressing the following matters:

(i) the court must first make a determination whether a document sought to be adduced comes within the definition of "banker's books". This is a mixed question of fact and law, and it may not be obvious from the face of every document that they fulfil the requirements that I have articulated at para. 38 *ante*. Accordingly, evidence may well have to be led as to the purpose for which the bank had generated, or maintained a record of, the document in question; and

(ii) once this determination is made, then the plaintiff will have to satisfy the court that:

(a) in the case of a copy of an entry in a banker's book, the requirements of ss. 4 and 5 of the Bankers' Books (Evidence) Act 1949 have been fulfilled; and

A (b) in any other case, the requirements relating to proof of a document and its relevancy and admissibility have been fulfilled.

[74] Nonetheless, the guidance that I have provided in this judgment in the form of the general applicable principles should substantially address the issues raised in argument before me.

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[75] I had directed that parties bear their own costs in relation to encl. 307. I make the same direction in respect of encl. 395.

Endnotes:

C 1. [1996] AC 890

2. The expression "English" and its cognates is used *passim* as a shorthand to refer to legal jurisdiction of England and Wales

3. [2001] 1 All ER 376, decided under the amended English Bankers Book Evidence Act 1879

D 4. (1906) 22 TLR 573

5. [1988] 1 QB 161, also decided under the updated 1879 Act

6. [1980] 1 WLR 885

E 7. [2011] 10 CLJ 186; [2010] 11 MLRH 820

8. [1895] 2 QB 669

9. [1981] 1 LNS 204; [1990] 2 MLJ 282; [1989] 3 MLRH 223

10. [1994] 2 CLJ 581; [1993] 4 MLRH 380

F 11. (1887) 36 Ch D 731

12. *Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40; [2009] 5 MLRA 631 (CA)

13. (1980) 30 ALR 559

G 14. [2003] 5 CLJ 436; [2003] 2 AMR 70, [2003] 5 MLJ 276, [2002] 3 MLRH 877

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